IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 21ST NOVEMBER 2007 / 30TH KARTHIKA 1929

RSA.No. 919 of 2007()

AS.121/2004 of SUB COURT, KASARAGOD
OS.27/2004 of PRL.MUNSIFF, KASARAGOD

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: APPELLANT/APPELLANT/DEFENDANT:

M.P. MOOSA HAJI, AGED 58 YEARS,
S/O. KUNHAHAMMED HAJI, MARIYAMBI MANZIL,
PATHWADI, MULINJA VILLAGE, KASARGOD TALUK,
P.O. UPPALA.

BY ADV. SRI.SURESH KUMAR KODOTH

RESPONDENTS: RESPONDENTS/PLAINTIFFS:

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1. BEEPATHUMMA, W/O. MAMMED BEARY,
RESIDING AT ANCHIKATTA, UPALA VILAGE AND POST,
KASARGOD TALUK.

2. SAFIA, D/O. MAMMED BEARY,
RESIDING AT ANCHIKATTA, UPALA VILLAGE AND POST,
KASARGOD TALUK.

3. AYSHA, D/O. MAMMED BEARY,
RESIDING AT ANCHIKATTA, UPALA VILLAGE AND POST,
KASARGOD TALUK.

4. MUHAMMED BAZHEER, S/O. MAMMED BEARY,
RESIDING AT ANCHIKATTA, UPALA VILLAGE AND POST,
KASARGOD TALUK.

5. IBRAHIM KALEEL, S/O. MAMMED BEARY,
RESIDING AT ANCHIKATTA, UPALA VILLAGE AND POST,
KASARGOD TALUK.

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION

ON 21/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER ON I.A.1921/2007 IN R.S.A.NO.919/2007

21.11.2007 Dismissed Sd/- M.Sasidharan Nambiar
Judge

/true copy/

P.S. To Judge

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO.919 OF 2007

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Dated this the 21st day of November, 2007

JUDGMENT

Defendant in O.S.27/2004 on the file of Munsiff Court, Kasargod is the appellant. Plaintiffs are respondents. Respondents instituted the suit seeking a decree for mandatory and prohibitory injunction. Plaint A schedule property originally belonged to late Mammed Beary. First respondent is the widow and other respondents the children. On the death of Mammed Beary, his rights devolved on the respondents. As per Ext.A1 sale deed dated 22.7.2002, legal representatives of Mammed Beary including respondents sold plaint A schedule property in favour of appellant. Case of respondents is that while selling the property vendors reserved a right to use a pathway having about 5 feet width passing on the northern most portion of R.S.86/4 leading to the remaining portion of the property in the same survey number

situated to the east and south of the property from R.S.No.88 and the pathway is on the northern most portion of plaint A schedule property and R.S.No.86/3 belongs to third party and pathway is situated to the back side of the quarters situated in the plaint A schedule property and appellant has no right to cause any obstruction to that way. It was contended that since location of the pathway passing through R.S.No.86/4 was not clearly mentioned in Ext.A1 sale deed, appellant and respondents entered into Ext.A2 agreement on 24.7.2002, showing the exact location of the pathway as the northern portion of 12 cents of land sold under Ext.A1. It was also provided that appellant has a right to dig a bore well in the property retained by the vendors in case, he does not get water in the bore-well to be bored in the plaint A schedule property. It was also contended that pursuant to the agreement appellant bored a bore-well and obtained plenty of water and appellant is not entitled to cause any obstruction

to the way as provided under Ext.A1 and therefore they are entitled to a decree for permanent prohibitory injunction as well as mandatory injunction. Appellant resisted the suit admitting Ext.A1 and A2. It was contended that vendors sold plaint A schedule property for Rs.1,40,000/- and the property contain a row of line quarters and there existed a pathway outside the properties on the northern side in R.S.No.86/3 and it belonged to third parties and while incorporating the boundary, the northern boundaries is shown as R.S.No.86/3 and a pathway for the remaining properties of the vendors was provided and appellant expressed the intention of improving the properties purchased by digging a bore-well and reconstructing compound wall around the property and then the vendors wanted appellant to execute an agreement to retain a right to dig bore-well and to protect the pathway referred to in Exts.A1 and thus Ext.A2 agreement was executed. It was contended that the pathway referred to in the document is situated outside the

plaint A schedule property and while constructing the compound wall respondents proclaimed that they will file a suit and obtain ex parte orders and therefore appellant was constrained to lodge a caveat and respondents have no right of way through the plaint schedule property and the suit is only to be dismissed.

2. Learned Munsiff on the evidence of PW1, DW1, Exts.A1 to A3, B1 and B2, C1 to C3 and X1 granted a decree holding that under Exts.A1 and A2 respondents have right over the way provided under Ext.A2 and appellant is not entitled to cause any obstruction to it and appellant is bound to remove the laterite stone compound wall put up across the pathway in the northern most portion of plaint A schedule property on the western and eastern corners. A decree for mandatory and prohibitory injunction was granted. Appellant challenged the decree and judgment before Sub Court, Kasaragod in A.S.121/2004. Learned Sub Judge on reappreciation of evidence confirmed the

findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of the learned counsel is that the way provided under Ext.A1 is not through the property sold under Ext.A1, but outside and under Ext.A2 respondents have no right for a way through the property sold under Ext.A1 and therefore the decree granted is unsustainable. It was also argued that there is no possibility for providing such a way in view of the existence of the kitchen and the area beyond the kitchen available and therefore the decree granted is unsustainable.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal.

6. Appellant purchased plaint A schedule property admittedly under Ext.A1 sale deed. Ext.A1 sale deed expressly provide for a way

though the property sold thereunder. In fact the sale was subject to the right of way reserved thereunder. But the exact location of the way was not shown in Ext.A1. It is thereafter, because of that ambiguity with regard to the way, Ext.A2 agreement was executed. Ext.A2 specifically provide the location of the pathway. Ext.A2 also provides that if the appellant could not get water by boring a bore-well in the plaint A schedule property, he has a right to dig a bore-well in the remaining portion of the property of respondents. As rightly found by the courts below, when Ext.A2 specifically provide the right of the respondents and when Ext.A1 title deed provide the right of way and Ext.A2 fortifies that right, appellant is not entitled to dispute the right granted by the courts below.

The appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.330 /1994

JUDGMENT

15TH NOVEMBER,2007